

assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women).⁶⁴ Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

95. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by members of minority groups and women. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we could choose from in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

96. We intend in the new broadband personal communications service to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully in this Order, in some respects it is necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of personal communications services than is necessary to ensure participation by other designated entities. In particular, we have concluded that steps such as adoption of bidding credits, tax certificates, alternate payment plans and relaxed attribution rules, must be taken to encourage investment in minority and women-owned businesses. These special provisions are tailored to address the major problem facing minorities and women desiring to offer PCS -- lack of access to capital. Moreover, because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in

⁶⁴ As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n. 3.

other, less costly spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. The measures we adopt today will also increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of broadband PCS service.

97. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital. Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."⁶⁵ Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."⁶⁶

98. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."⁶⁷ A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. In October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.⁶⁸ The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, it is reasonable to expect that race would affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan

⁶⁵ Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

⁶⁶ Id., Section 331(b)(2),(3).

⁶⁷ Id., Section 112(4); 331(a)(4).

⁶⁸ Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

process, which uses more standard rules.

99. Importantly, the Boston study also found that, because most loan applicants have some negative attributes, most loan denials will appear legitimate by some objective standard. Accordingly, the study stated, the lending discrimination that occurs is very difficult to document at the institution level, so legal remedies may be largely ineffective. Indeed, Congress had already attempted to address discriminatory lending practices through laws that bar discrimination in lending, such as the Equal Credit Opportunity Act, enacted in 1974 and amended many times since then. Congress, therefore, could reasonably assume, based on the Boston study, and its legislative experience regarding discriminatory lending practices, that minority applicants for licenses issued in spectrum auctions would face substantial (albeit subtle) barriers to obtaining financing. Any legal remedies, even if effective, would, moreover, come too late to ensure that minorities are able to participate in spectrum auctions and obtain licenses.

100. Similar evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college educated, similarly-situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to \$1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only \$1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.⁶⁹

101. The inability to access capital is also a major impediment to the successful participation of women in broadband PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.⁷⁰ As AWRT

⁶⁹ Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

⁷⁰ Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. See Pub. L. 102-191 (1991).

documents, these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the \$3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.⁷¹

102. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.⁷²

103. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract these barriers to entry. Over the years, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women. For example, in the late 1960s, the FCC began to promote nondiscriminatory employment policies by broadcast licensees. These equal employment opportunity efforts have taken the form of Commission rules and policies that require licensees not to discriminate, to report hiring and promotion statistics, and to implement affirmative action programs.⁷³ The Commission also has adopted similar equal employment rules for licensees in the common carrier, public mobile, and international fixed

⁷¹ See Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

⁷² See The National Foundation for Women Business Owners, *Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners*, October 1993.

⁷³ 47 C.F.R. § 73.2080 (broadcasters must "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of the station's employment policy and practice").

public radio communication services,⁷⁴ as well for cable operators.⁷⁵ The cable EEO rules were recently revised as part of the implementation of the Cable Act of 1992, and they now apply to cable entities, satellite master antenna television operators serving 50 or more subscribers and any multichannel video programming distributor.⁷⁶

104. A decade after it first addressed discriminatory hiring practices, the Commission began to look into the serious underrepresentation of minorities among owners of broadcast stations. Recognizing that it could play an important role in alleviating this problem through the licensing process, the Commission adopted its tax certificate and distress sale policies in 1978 to encourage minority ownership of broadcast facilities.⁷⁷ It noted that full minority participation in the ownership and management of broadcast facilities would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a valuable resource, the electromagnetic spectrum.⁷⁸

105. In implementing these ownership policies, the Commission identified lack of access to capital as one of the principal barriers to minority entry. Thus, in 1981, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the "Rivera Committee") to investigate financing methods and to give recommendations to the FCC on ways to encourage minority ownership of telecommunications facilities.⁷⁹ The Rivera Committee confirmed that the shortage of

⁷⁴ 47 C.F.R. §§ 21.307, 22.307, 23.55.

⁷⁵ 47 C.F.R. §§ 76.71-76.79.

⁷⁶ See 47 U.S.C. § 554. In addition, the Commission has proposed adopting EEO requirements for all CMRS licensees, including PCS licensees. Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, GN Docket 93-252, FCC 94-100 (released May 20, 1994).

⁷⁷ See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) (1982 Policy Statement); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) (1978 Policy Statement).

⁷⁸ Because of the role of cable television systems in retransmitting broadcast signals, the Commission has also issued tax certificates in connection with sales of cable systems. See Statement of Policy on Minority Ownership of CATV Systems, FCC 82-524, released December 22, 1982.

⁷⁹ Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982 (Rivera Committee Report).

capital is a principal problem facing minorities seeking ownership opportunities and further found that this shortage was due to minority inexperience in obtaining financing, financial institution misconceptions about potential minority borrowers, and marketplace structural problems, such as high interest rates and low broadcast industry earnings growth. Among other things, the Rivera Committee suggested educational and outreach programs and expanding the tax certificate program to nonbroadcast properties such as common carrier and land mobile. In response to this recommendation, the FCC submitted draft legislation to Congress proposing to broaden the scope of the Commission's authority to issue tax certificates in connection with the sale or exchange of any type of telecommunications facilities.⁸⁰ On March 24, 1983, The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, which incorporated the Commission's proposals, was introduced in the House of Representatives.⁸¹

106. Congress also took steps to address the problem of minority underrepresentation in communications. In 1982, it mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988 and each fiscal year thereafter, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.⁸²

107. These efforts have met with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the

⁸⁰ See Federal Communications Draft Legislation Revising Section 1071 of the Internal Revenue Code of 1954 (January 17, 1983).

⁸¹ The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, 98th Congress, 1st Sess., March 24, 1983.

⁸² See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-102, 101 Stat. 1329-31; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. 103-121, 107 Stat. 1167.

United States.⁸³ And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.⁸⁴ When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.⁸⁵ One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to PCS. They thus face an additional barrier relative to many existing service providers.

108. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.⁸⁶

109. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of PCS. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority for many PCS licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas profitably. We, therefore, have adopted special provisions to encourage their participation, increasing the likelihood of rapid introduction of service to rural areas.

110. In the new auction law, Congress directed the Commission to remedy this

⁸³ See Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

⁸⁴ See Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

⁸⁵ Id.

⁸⁶ Ex parte filing of DCR Communications, May 31, 1994.

serious imbalance in the participation by certain groups, especially minorities and women. The record indicates that, in the absence of meaningful efforts to assist designated entities, there would be good reason to think that participation by these groups, particularly businesses owned by women and minorities, would continue to be severely limited. Indeed, the auction law itself envisions a process that requires payment of funds to acquire an initial license, unlike existing licensing methods such as comparative hearings or lotteries. It is therefore possible that participation by those with limited access to capital could be further diminished by operation of the statute, absent affirmative provisions to create competitive opportunity for designated entities. The measures we adopt in this Fifth Report and Order thus will carry out Congress's directive to provide meaningful opportunities for small entities, rural telephone companies, and businesses owned by women and minorities to provide broadband PCS services. The rules also are expressly designed to address the funding problems that face these groups and that are their principal barriers to entry.

111. We also intend that designated entities who win licenses have the opportunity to become strong competitors in this service. While the new broadband PCS service presents tremendous opportunities for designated entities to participate in the provision of the next generation of innovative wireless mobile telecommunications services, it is expected to be a highly competitive service, and the estimated costs of acquiring a license and constructing facilities are substantial. In the Broadband PCS Reconsideration Order, which was adopted June 9, 1994, we took specific steps to assist designated entities to become viable competitors in the provision of broadband PCS. For example, we modified the PCS spectrum allocation plan by shifting all channels blocks to a contiguous lower segment of the "emerging technologies band" in part to bolster the ability of designated entities to obtain more competitively viable licenses. In addition, we relaxed some of the ownership and attribution rules with respect to cellular operators' participation in PCS to foster investment in designated entity ventures,⁸⁷ and we also relaxed the PCS/cellular cross-ownership rule for designated entities with cellular holdings to allow them to further expand their opportunities in broadband PCS.⁸⁸ Further, we took steps that will result in lower capital costs for designated entities that obtain PCS licenses, including adoption of a band plan that will reduce the costs of clearing the PCS spectrum of incumbent microwave users as well as relaxing the construction requirements.

112. The measures we establish today to encourage the entry of designated entities also are designed to promote strong, long-term bona fide competitors. For example, we have revised the definition of a small business set forth in the Second Report and Order to include entities with up to \$40 million in gross revenues, and we will allow these small businesses to pool their resources and form consortia to bid in the entrepreneurs' blocks. We also adopt rules that allow entrepreneurial businesses, small businesses, and businesses owned by women

⁸⁷ Broadband PCS Reconsideration Order at ¶127.

⁸⁸ Id. at ¶125.

and minorities to raise capital by attracting passive equity investors. At the same time, we have designed these rules to ensure that the special provisions adopted for such businesses accrue to the intended beneficiaries.

B. Summary of Special Provisions for Designated Entities

113. As discussed more fully below, many commenters in this proceeding believe that the inability of designated entities to obtain adequate funding has a profoundly adverse effect on the potential for these businesses to bid successfully in auctions against very large, established businesses. Therefore, we take a number of steps in this Order to help address this imbalance.

- We establish two "entrepreneurs' blocks" (frequency blocks C and F) in which large companies (those with \$125 million or more in annual gross revenues or \$500 million or more in total assets) will be prohibited from bidding.
- Bidding credits will be granted both to small businesses and to businesses owned by women and minorities in the entrepreneurs' blocks to provide them with a better opportunity to compete successfully in broadband PCS auctions.
- Certain winning bidders in frequency blocks C and F will be permitted to pay the license price in installments, and the interest rate and moratorium on principal payments will be adjusted to assist small businesses and women and minority-owned businesses.
- We adopt a tax certificate program for minority and women-owned businesses, which will provide additional assistance in their efforts to attract equity investors.
- Rural telephone companies will be allowed to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas to provide them more flexibility to serve rural subscribers.⁸⁹
- Bidders in the entrepreneurs' blocks will be required to pay an upfront payment of only \$0.015 per MHz per pop, in contrast to the \$0.02 per MHz per pop required in the other blocks.

⁸⁹ In a Further Notice of Proposed Rule Making in this docket, we will seek comment on whether a partitioning option for small businesses or businesses owned by women or minorities, as suggested by some of the commenters, may be appropriate. In that Further Notice, we also will seek comment on whether the Commission should impose a restriction on the assignment or transfer of control of partitioned licenses by rural telephone companies or other designated entities for some period of time.

114. The following chart highlights the major provisions adopted for businesses bidding in the entrepreneurs' blocks.⁹⁰

	<u>Bidding Credits</u>	<u>Installment Payments</u>	<u>Tax Certificates for Investors</u>
Entrepreneurial Businesses (\$40 MM - \$125 MM in revenue and less than \$500 MM in total assets)	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than \$75 MM, available only in top 50 markets)	No
Small Businesses (less than \$40 MM revenues)	10%	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%;	No
Businesses Owned by Minorities and/or Women (\$40 MM - \$125 MM in revenues)	15%	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes
Small Businesses Owned by Minorities and/or Women (less than \$40 MM revenues)	25%	Interest only for 5 years; rate equal to 10-year treasury note;	Yes

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

115. The following points summarize the principal rules regarding eligibility to bid in the entrepreneurs' blocks and to qualify as a small business. In addition, they summarize the attribution rules we will use to assess whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

⁹⁰ This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

Financial Caps:

- Entrepreneurs' Blocks: To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than \$125 million in gross revenues and less than \$500 million in total assets. No individual attributable investor or affiliate may have \$100 million or more in personal net worth.
- Small Business: To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have less than \$40 million in gross revenues. No individual attributable investor or affiliate may have \$40 million or more in personal net worth.

Attribution Rules:

- Control Group. The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.
- The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.
- Other Investors. Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
 - Passive Equity. Passive equity is limited partnership or non-voting stock interests or voting stock interests of 5 percent or less of the issued and outstanding voting stock.
- Option for Minority or Woman-Owned Applicants. If the control group (consisting entirely of women and/or minorities) owns at least 50.1 percent of the equity and, for corporations, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
- Affiliates. The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

116. The points below summarize the two structural options available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1% Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 50.1 percent of the equity
 - and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - not more than 49.9 percent of the passive equity (which, for corporations, includes as much as 5 percent of the voting stock).

25% Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 25 percent of the equity
 - and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - less than 25 percent of the passive equity (for corporations, any other investor also may hold not more than 5 percent of the voting stock).

117. We also have imposed numerous strict requirements to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission intends to enforce vigorously each of these requirements. All licensees in the entrepreneurs' blocks are prohibited from voluntarily assigning or transferring their licenses for three years after grant of the application and for the next two years may assign or transfer licenses only to other entities that satisfy the financial criteria to bid in the entrepreneurs' blocks. Furthermore, a business that seeks to acquire a license from an entity paying in installments during the license period will be required, as a condition of the grant, to pay according to the installment payment terms for which it qualifies, unless they are more favorable in which case the existing terms apply. If the purchaser is not qualified for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved. We also adopt rules to ensure that the value of the bidding credit is returned to the government in the event of a transfer of control or assignment of the license to an entity not qualifying for bidding credits or not qualifying for as high a bidding credit as the seller. In addition, we

impose a one-year holding period on licenses received through the benefit of a tax certificate. We will also conduct random audits to ensure that designated entities retain de facto and de jure control. These steps and our eligibility and affiliation rules will help to ensure that the measures we adopt are utilized only by bona fide eligible entities and to deter winning bidders seeking only to make a quick profit on the sale of PCS licenses. Ultimately, we believe that we will best fulfill our statutory mandate by creating powerful incentives for bona fide designated entities to attract the capital necessary to compete both in auctions for broadband PCS and in the provision of service, and by requiring a strict holding period to ensure that the public receives the benefit of this diverse ownership.

D. The Entrepreneurs' Blocks

118. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.⁹¹ The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in broadband PCS auctions.

119. In addition, commenters contend that, at the outset, a small PCS business and a large local exchange carrier would value a license very differently. DCR Communications, for example, argues that a local telephone company would have much lower costs of construction and operation through equipment volume discounts, existing billing, accounting, order entry and processing, and customer service systems. Furthermore, DCR contends, the telephone company might decide to use its PCS system simply as an adjunct to a cellular system it owns in a nearby market and market wireless handsets that operate in both frequencies. DCR concludes that the telephone company could justify paying the higher value for the license because it has more ready access to capital.⁹²

120. This concern is echoed by a number of commenters. NTIA agrees that capital formation is a major barrier to full participation by small and minority-owned firms, asserting that capital-constrained firms are likely to assign lower values to PCS licenses than other bidders and are therefore less likely to obtain licenses in an open bidding market.⁹³ Another party, Impulse Telecommunications Corporation, states that "giants" can justify huge bids because they have billions of dollars of capital as well as an existing administrative, billing,

⁹¹ See H.R. Rep. No. 103-111 at 255.

⁹² Ex parte filing of DCR Communications, May 31, 1994.

⁹³ NTIA Comments at 26.

operating and marketing infrastructure. In addition, Impulse asserts that PCS licenses are likely to hold strategic value for large long distance and local telephone companies, for such purposes as critical wireless access.⁹⁴ Similarly, Tri-State Radio Company states that the allocation of substantial amounts of spectrum to services such as broadband PCS has generated extensive industry expectation and speculation. With the financial stakes so high, Tri-State argues that designated entities will have little ability to bid successfully against "communications behemoths with almost unlimited financial resources."⁹⁵

121. We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. In the Notice, we proposed that one means to address such problems would be to set aside specific spectrum blocks in broadband PCS that would be reserved for bidding purposes to the designated entities.⁹⁶ In this Order, we have decided to adopt a modification of this proposal, which should greatly enhance the ability of all designated entities to enter auctions and bid successfully for broadband PCS licenses. Specifically, we establish two entrepreneurs' blocks, C and F, in which eligibility to bid is limited to entities that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor in the applicant has \$100 million or greater in personal net worth. Together with a reduced upfront payment requirement, we believe this proposal will encourage smaller entities to enter the auctions for broadband PCS licenses and will ensure that "entrepreneurial" businesses are granted nearly half of all the broadband PCS licenses being auctioned.

122. NTIA strongly supports this measure, arguing that it "would be the most direct mechanism for preserving opportunities for small companies in an auction environment." According to NTIA, reserving two entrepreneurs' blocks helps significantly in satisfying the congressional directive that competitive bidding not result in an increase in concentration in

⁹⁴ Ex parte filing of Impulse Telecommunications Corporation, May 27, 1994.

⁹⁵ Tri-State Comments at 11. See also comments of NAMTEC (designated entities should not have to compete against "more entrenched parties"), National Rural Telecom Association (the only way small entities can have real opportunity is if they do not have to bid against "extremely 'deep pocket' applicants"), The Small Business PCS Association (it will not be possible for designated entities "to compete in an auction against some of the largest companies and wealthiest individuals in the United States"), JMP (without preferences for designated entities, large telecommunications firms will "monopolize" the auctions), Minority PCS Coalition at 6, Telephone Association of Michigan at 9-10, Iowa Network at 9, AWRP at 8, Telephone Electronics at 7-8, Sloan at 2.

⁹⁶ Notice at ¶ 121.

the telecommunications industries.⁹⁷ Similarly, Columbia PCS contends that establishment of entrepreneurs' blocks "provides a good balance between Congress's clear mandate to provide opportunities for designated entities and avoid undue concentration of PCS licenses on the one hand with the goal of capturing the value of allocated spectrum for the American public on the other."⁹⁸

123. The \$125 million gross revenue/\$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees on the MTA blocks. For example, the \$125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,⁹⁹ and would include virtually all of the independently owned rural telephone companies. Limiting the personal net worth of any individual investor or affiliate of the applicant to \$100 million will prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepreneurs' blocks.

⁹⁷ Ex parte filing of NTIA, June 21, 1994.

⁹⁸ Ex parte filing of Columbia PCS, June 2, 1994. Columbia PCS further states that this measure would spur investment in designated entities and increase their ability to compete against one another and others. Id.

⁹⁹ Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of \$100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than \$100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the \$100 million mark in each of five consecutive years. The Commission imposes more relaxed regulatory requirements on Tier 2 LECs than on Tier 1 LECs. See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772 (1987), Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994); Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

124. As noted previously, many commenters asked us to reserve spectrum blocks for bidding only by designated entities. The entrepreneurs' blocks plan adopted herein is similar in concept to the set-aside proposals set forth by the commenters. Therefore, in determining which of the blocks in each market should constitute the entrepreneurs' blocks, we paid close attention to the concerns of those who had advocated set-asides in the first instance. Although the broadband PCS band plan has changed since the Commission first proposed set-asides in the Notice and parties first submitted their proposals in this docket, the general concerns of these parties about the amount of spectrum and geographic territory necessary to compete effectively remain pertinent. Moreover, we adopted the revised broadband PCS band plan in advance of this Order, which afforded interested parties the opportunity to make additional presentations on designated entity incentives in light of the new band plan.

125. A number of commenters approved of the Notice's proposal to set aside one 20 MHz BTA block and one 10 MHz BTA block. The Small Business PCS Association asserted, moreover, that implementation of the set-aside proposal would offer "a major opportunity" for small businesses, that a 20 MHz block is "probably ideal" for development by small entrepreneurs, and that even a 10 MHz block could sustain a viable PCS System.¹⁰⁰ Telepoint makes similar assertions.

126. A considerable number of commenters, however, contended that the Commission's proposal to set aside a 20 MHz block and a 10 MHz block would be inadequate. Telephone Electronics and AWCC asserted, for instance, that a provider operating with only a 10 MHz or 20 MHz license could not offer a full range of PCS services with quality equivalent to the like offerings of a provider operating with a 30 MHz license. Unique and AWCC thus argued that PCS licensees in the set-aside spectrum would consequently be unable to obtain commercial funding on terms as favorable to those available to operators with 30 MHz licenses. Independent Cellular Network maintained that the competitive disadvantages of the proposed set-aside channels, due to their lesser bandwidth, could not be obviated through aggregation, because of the greater transaction costs that would be incurred above those associated with acquisition of a single 30 MHz license.

127. We believe that designating frequency blocks C and F as entrepreneurs' blocks meets the concerns of most of the designated entity commenters. Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of bandwidth to compete effectively. The 10 MHz block F license, on the other hand, fulfills the needs of other designated entities who argued in favor of smaller

¹⁰⁰ The Small Business PCS Association stated that a small business operating in a single BTA service region could effectively compete with large companies operating in larger service areas. This is so, it contended, mainly because PCS providers with large service areas would not realize such great economies of scale as many have supposed and because small firms could counter such advantages by forming buying cooperatives. Comments of Small Business PCS Association at 2-3.

blocks. Moreover, since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees. This plan also makes available to eligible bidders in the entrepreneurs' blocks 986 licenses, or slightly under 50 percent of all broadband PCS licenses. Finally, it does not foreclose opportunities for other parties. Bidders ineligible for the entrepreneurs' blocks will have the opportunity to bid on 99 30 MHz MTA licenses throughout the country, as well as 986 10 MHz BTA licenses nationwide.

128. Five-Year Holding and Limited Transfer Period In establishing the entrepreneurs' blocks, we recognize the congressionally mandated objective will not be served if parties take advantage of bidding in these blocks and immediately assign or transfer control of the authorizations to other entities. Such a practice could unjustly enrich the auction winners and would undermine the congressional goal of giving designated entities the opportunity to provide spectrum-based services. Therefore, we will prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.¹⁰¹ And, for the next two years of the license term, we will permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.¹⁰² During this five-year period, licensees will continue to be bound by the financial eligibility requirements, as set forth below.¹⁰³ In addition, a transferee or assignee who receives a C or F block license during the five-year period will remain subject to the transfer restrictions for the balance of the holding period.¹⁰⁴ The Commission will conduct random pre and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

¹⁰¹ We will consider exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. Paramount Pictures, Inc., 43 FCC 453 (1949); Cf. William Penn Broadcasting, 16 FCC 2d 1050 (1969).

¹⁰² We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. See infra ¶¶ 134, 141. We also clarify that rural telephone companies receiving partitioned licenses in the entrepreneurs' blocks are subject to this five-year holding and limited transfer period.

¹⁰³ See infra ¶¶ 156-168. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

¹⁰⁴ For example, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee.

129. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain de facto and de jure control of their companies at all times. We believe that the five-year holding and limited transfer period, which we have adopted in this Order, will help to promote this objective. Some question remains, however, as to whether a longer holding period (e.g., seven years) would more fully meet this goal.

E. Bidding Credits

130. In the Notice, we indicated that we might use spectrum set-asides for designated entities in the broadband PCS service but did not expressly propose to use bidding credits. For two other services, IVDS and narrowband PCS, however, we did conclude recently that the use of bidding credits in auctions would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of those services.¹⁰⁵ On further reflection, and based on the many comments in the record favoring this approach, we believe that bidding credits are necessary to ensure that women and minority-owned businesses and small businesses participate in broadband PCS. Accordingly, we adopt a bidding credit plan for winning bidders in the entrepreneurs' blocks that gives small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

131. At the outset, we note that we are confining the bidding credit option to the entrepreneurs' blocks because, given the extremely capital intensive nature of broadband PCS, we do not think bidding credits in an uninsulated block would have a meaningful effect.¹⁰⁶ Indeed, in ex parte presentations to the Commission, many commenters have indicated that, without spectrum set-asides for broadband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. DCR Communications states, for example, that all of the existing large telecommunications carriers can justify much larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.¹⁰⁷ Many

¹⁰⁵ See Third Report and Order, FCC 94-98, 9 FCC Rcd ____ (released May 10, 1994); Fourth Report and Order, 9 FCC Rcd 2330 (released May 10, 1994).

¹⁰⁶ We also are concerned that allowing bidding credits in the MTA blocks would increase substantially the incentive for businesses to engage in shams and fronts.

¹⁰⁷ Ex parte filing of DCR, May 31, 1994, at 4-5.

other commenters echo this concern.¹⁰⁸ Some state that, if bidding credits alone are used, extraordinarily large credits, even on the order of 50 percent or more, would be ineffective.¹⁰⁹ As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the broadband PCS service, we have taken measures to exclude very large businesses from bidding for licenses in the C and F blocks. These measures will enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits will have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in these blocks.

132. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in broadband PCS.¹¹⁰ In effect, the bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we will provide them with a slightly higher bidding credit than that granted to small businesses. Thus, women and minorities will receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups and that a cumulative bidding credit of 25 percent is therefore appropriate. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a broadband PCS system, consistent with the intent of Congress.

¹⁰⁸ See ex parte filings of DigiVox Corporation, May 31, 1994, at 3 (the use of bidding credits to the exclusion of frequency set-asides will not fulfill the objectives of Section 309(j)), Communications International Wireless Corp., May 27, 1994, at 1 (bidding credits alone cannot level the playing field between designated entities and members of the Fortune 100 companies), CWCC, May 27, 1994, at 2 (bidding credits alone cannot level the playing field for designated entities).

¹⁰⁹ Ex parte filings of AWCC, May 26, 1994 at 2, Columbia PCS, June 2, 1994 at 2.

¹¹⁰ Although we did not grant bidding credits to small businesses in the narrowband PCS or IVDS services, we believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses and construct the systems, bidding credits are a proper means to ensure that these firms have the opportunity to participate in this service. We note that for narrowband PCS and IVDS, the cost of license acquisition and implementation of service is anticipated to be considerably more modest.

133. The definition of a minority or women-owned firm and of a small business are set forth below.¹¹¹ To receive a 10 percent bidding credit, a small business must satisfy a gross revenue test. As explained more fully below in the small business definition section, a consortium consisting entirely of small businesses also is eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

134. Unjust Enrichment Applicable to Bidding Credits To ensure that bidding credits benefit the parties to whom they are directed, we adopt strict repayment penalties. If, within the original term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the U.S. Treasury as a condition of approval of the transfer. For example, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than \$40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits will entail full payment of the bidding credit as a condition of transfer. Small businesses also will be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the \$40 million small business cap, this repayment provision will apply.¹¹² These repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding credits.

F. Installment Payments

135. A significant barrier for most businesses small enough to qualify to bid in the entrepreneurs' blocks will be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.¹¹³ In the Second Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for

¹¹¹ See infra ¶¶ 172-192.

¹¹² See infra ¶¶ 158-168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues caps.

¹¹³ See e.g., comments of SBA Chief Counsel of Advocacy at 6, 20-21, NTIA at 27; SBAC Report at 2 (September 15, 1993).

the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations. See Second Report and Order at ¶¶ 236-240.

136. In light of the expected substantial capital required to acquire and construct broadband PCS licenses, we conclude that installment payments are an appropriate measure for most businesses that obtain broadband PCS licenses in the entrepreneurs' blocks. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing will promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we adopt today, installment payments are available to smaller entities that do not technically qualify as small businesses for purposes of other measures we have adopted, such as bidding credits. We believe, however, that, given the enormous costs of broadband PCS and the likelihood of very large participants in the other blocks, this option is fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.¹¹⁴

137. Under the plan we adopt here, all licensees that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks will be allowed to pay in installments for licenses granted in those blocks in the 50 largest BTAs. In the smaller BTAs, however, only businesses owned by women and minorities and those licensees with less than \$75 million in gross revenues will be able to use installment payments.¹¹⁵ This distinction is based on the expected lower costs to acquire licenses and construct systems in the smaller BTAs. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding \$75 million will require government financing to be competitive in the

¹¹⁴ See H.R. Rep. No. 103-111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

¹¹⁵ We will apply the same \$500 million total assets and \$100 million personal net worth standards for purposes of determining eligibility for installment payments in all BTAs. The attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks also will apply in all BTAs. See infra ¶¶ 158-168.

smaller BTAs.¹¹⁶

138. The installment payment option will enable qualified businesses to pay their winning bid over time. These businesses must make the applicable upfront payment in full before the auction, but are required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment will be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price will be paid in installments with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this general rule, only payments of interest will be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments will be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license.¹¹⁷

139. Enhanced Installment Payments As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in broadband PCS. Accordingly, we will provide an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses (as defined below) who win licenses in the entrepreneurs' blocks will be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities will be able to make interest-only payments for three years. Interest will accrue at the Treasury note rate without the additional 2.5 percent.¹¹⁸ And, finally, businesses that are both small and owned by women and/or minorities will be required to pay only interest for five years. Interest will accrue at the Treasury note rate.

140. These enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs will allow small businesses and companies owned by women and/or

¹¹⁶ We note that a consortium of small businesses is eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section VII.J.2, infra.

¹¹⁷ As described in the Second Report and Order, the Commission may, on a case-by-case basis, permit a three to six month grace period within which a licensee may seek a restructuring of the payment plan.

¹¹⁸ To be eligible for these "enhanced" installment payments, a firm must satisfy either of the two alternative definitions of a woman or minority-owned business, as set forth in ¶¶ 181-192, infra, as well as the applicable financial caps.

minorities to bid higher in auctions, thereby increasing their chances for obtaining licenses. In addition, it will allow them to concentrate their resources on infrastructure build-out and, therefore, it will increase the likelihood that they become viable PCS competitors.

141. Unjust Enrichment Applicable to Installment Payments To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we will use the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. See Second Report and Order at ¶ 263; 47 C.F.R. § 1.2111(c). Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect.¹¹⁹ Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision will also apply.¹²⁰

G. Tax Certificates

142. Congress instructed the Commission to consider the use of tax certificates to help ensure designated entity participation in spectrum-based services. See 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in

¹¹⁹ We recognize that because of the five-year holding and limited transfer requirements in the entrepreneurs' blocks, these unjust enrichment provisions have limited applicability during the first five years of the license term. Nevertheless, there are some situations in which licensees are permitted to assign or transfer their licenses during this period and the provisions would then apply if the buyer would not have been qualified for installment payments or as favorable an installment payment plan. Furthermore, the unjust enrichment provisions are applicable for the full ten-year license term.

¹²⁰ See infra ¶¶ 158-168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues and total assets thresholds.

subsequent service-specific auction rules. Second Report and Order at ¶ 251.

143. We believe that tax certificates, which allow the recipients to defer capital gains taxes made on sales, are an appropriate tool to assist women and minority-owned businesses to attract start-up capital from non-controlling investors in broadband PCS. As explained above, due to discrimination in private lending markets and other factors, these designated entities face added obstacles in accessing capital. Therefore, in order to ensure that such businesses have a meaningful opportunity to participate in auctions, it is necessary to adopt measures to encourage investment in minority and woman-owned companies. Moreover, because of the severe underrepresentation of women and minorities in telecommunications, we believe that it is appropriate to give PCS licensees the incentive, through the grant of tax certificates, to assign or transfer their authorizations to such entities in post-auction sales. This measure will provide added assurance that minority and women-owned entities have the opportunity to participate in broadband PCS services, as mandated by Congress. Accordingly, we will issue tax certificates to non-controlling initial investors in minority and women-owned broadband PCS applicants (in any frequency block), upon the sale of their non-controlling interests. We will also issue tax certificates to broadband PCS licensees (in any frequency block) who assign or transfer control of their licenses to minority and women-owned entities.

144. We have used tax certificates over the years to encourage broadcast licensees and cable television operators to transfer their stations and systems to minority buyers.¹²¹ We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.¹²² These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that tax certificates will be equally valuable in the broadband PCS context. Issuance of tax certificates to investors in minority and women-owned businesses and licensees that sell to minorities and women will augment the other measures we adopt today to encourage minorities and women to participate in broadband PCS and will increase the ability of these entities to access financing for that purpose.

145. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale by: (1) treating it as

¹²¹ See 1982 Policy Statement; 1978 Policy Statement. We have also employed tax certificates as a means of encouraging fixed microwave operators to relocate from spectrum allocated to emerging technologies. See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

¹²² See 1982 Policy Statement, 92 FCC 2d at 855-58.

an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property; or both. Tax certificates will be available to initial investors in minority and woman-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the post-auction market, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. The definition of a minority or women-owned entity is set forth below¹²³ and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For post-auction market sales, tax certificates will be issued only to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties may request a declaratory ruling from the Commission regarding the tax certificate consequences of prospective transactions.

146. One-Year Holding Period As with our other tax certificate policies, we are concerned about avoiding "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), thus adopt measures to prevent abuses. As in our existing tax certificate program,¹²⁴ we will impose a one-year holding requirement on the transfer of control or assignment of broadband PCS licenses by women and minority-owned businesses who obtained such licenses through the benefit of tax certificates. We believe that the rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority or woman-owned businesses. If the buyer itself is a women or minority-owned business, however, our objectives still will be satisfied. Thus, as an exception to the holding requirement, we will permit the assignment or transfer of control of licenses during this period to other qualified minority and women-owned businesses. We note, however, that the assignee or transferee who receives this license before the end of the original one-year holding period will also be subject to a one-year holding requirement, from the date of consummation of the assignment or transfer.

147. Finally, in the Broadband PCS Reconsideration Order, we indicated that we would address in this proceeding proposals for issuing tax certificates to cellular operators who divest their cellular holdings in order to come into compliance with our rules governing cellular operators' participation in broadband PCS. Several commenters argued that tax certificates should be issued to all such companies who divest their holdings.¹²⁵ To accomplish the directive in Section 309(j)(4)(D) that minority groups and women are given

¹²³ See infra ¶¶ 181-192.

¹²⁴ See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order, 99 FCC 2d 971, 974 (1985).

¹²⁵ See, e.g., Petitions for Reconsideration of GTE Service Corporation and Comcast Corporation of Second Report and Order in GEN Docket 90-314.

the opportunity to participate in the provision of spectrum-based services, we have decided to issue tax certificates to such cellular companies so long as their cellular interests are divested to businesses owned by minorities and/or women, as defined in this order. In this manner, we can further implement Congress's goal to facilitate the participation of minorities and women in spectrum-based services. We will also impose a one-year holding period requirement on the assignment or transfer of control of cellular licenses obtained by women and minority-owned businesses through the benefit of this tax certificate policy.

H. Provisions for Rural Telephone Companies

148. After the release of the Second Report and Order, rural telephone companies made numerous ex parte presentations concerning how we can best ensure that rural areas are provided broadband PCS. In addition, we have received several petitions for reconsideration of the Second Report and Order that address our definition of rural telephone companies in the generic auction rules. In this Order, we address the treatment of rural telephone companies for purposes of competitive bidding for broadband PCS licenses and address below some of the issues raised in petitions for reconsideration of the Second Report and Order concerning the definition of these entities.

149. In the Broadband PCS Reconsideration Order, we adopted an important measure that will help rural telephone companies become viable providers of PCS services. In response to numerous requests from rural telephone company interests, we increased from 20 percent to 40 percent the cellular attribution threshold for rural telephone companies with non-controlling cellular interests in their areas. See Broadband PCS Reconsideration Order at ¶ 125. This action increases the number of rural telephone companies that will be eligible to hold PCS licenses. In taking this action, we recognized that their existing infrastructure makes rural telephone companies well suited to introduce PCS services rapidly into their service areas and adjacent areas. Thus, this action will help speed service to rural areas, which tend to be less profitable to serve for companies without existing infrastructure than more densely populated urban areas.

150. We suggested in the Second Report and Order that allowing broadband PCS licenses to be geographically partitioned may be a means to permit rural telephone companies to hold licenses to provide service in their telephone service areas.¹²⁶ Many rural telephone companies proposed some form of partitioning in their comments, arguing that if they were required to bid on entire BTA or MTA licenses to obtain licenses covering their wireline

¹²⁶ See Second Report and Order at ¶ 243, n. 186. We note that although we stated in n. 186 that we would consider partitioning for rural telephone companies in the reconsideration of the broadband PCS service rules, we have concluded that this issue should be addressed along with other issues concerning designated entities. See Broadband PCS Reconsideration Order at ¶ 83, n. 113. In our deliberations on this issue, we incorporate into this proceeding the record developed in GEN Docket No. 90-314.

service areas, they would be effectively barred from entering the broadband PCS industry. They contend that under a partitioning plan, they would be able to serve areas in which they already provide service, while the remainder of the PCS service area could be served by other providers. Such a plan, they argue, would encourage rural telephone companies to take advantage of existing infrastructure in providing PCS services, thereby speeding service to rural areas.¹²⁷ We believe that these proposals have merit, and therefore we now adopt a license partitioning system to provide these designated entities the enhanced opportunity to participate in the provision of broadband PCS and to deploy broadband PCS in their rural service areas rapidly.

151. Our partitioning system will allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas. These companies will be permitted to acquire partitioned broadband PCS licenses in either of two ways in any frequency blocks: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants, and (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction. Each rural telephone company member of a consortium will, following the auction, be required to file a long-form application for its respective, mutually agreed-upon geographic area. If rural telephone company consortia are formed to bid on licenses in the entrepreneurs' blocks, the eligibility rules for those blocks will apply (*i.e.*, the cumulative gross revenues and assets of the consortium members may not exceed the financial caps for eligibility in these blocks).¹²⁸ We will require that partitioned areas conform to established geopolitical boundaries (such as county lines) and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the PCS service area. In addition, if a rural telephone company receives a partitioned license post-auction from another PCS licensee, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area.¹²⁹ We recognize that rural telephone companies will require some flexibility in fashioning the areas in which they will receive partitioned licenses, so we do not adopt a strict rule concerning the reasonableness of the partitioned area. Generally, we will presume as reasonable a partitioned area that contains no more than twice the population of that portion of a rural telephone

¹²⁷ See, *e.g.*, comments of GVNW at 2-4, Rural Cellular Association at 16, U.S. Intelco at 16.

¹²⁸ As discussed below, we will permit a consortium consisting entirely of small businesses to exceed the entrepreneurs' blocks financial thresholds. See *infra* ¶¶ 179-180. Therefore, if each member of a consortium of rural telephone companies also satisfies the definition of a small business, we will allow the consortium to bid in the entrepreneurs' blocks even if it exceeds the gross revenues and total assets caps.

¹²⁹ This provision will not apply when rural telephone companies form consortia only among themselves and then partition the license area. In this circumstance, one or more partitioned areas may have to be larger in order for the entire PCS service area to be served.

company's wireline service area that lies within the PCS service area. Each licensee in each partitioned area will be responsible for meeting the build-out requirements in its area.

152. Allowing partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. For example, rural telephone companies who cannot afford or do not desire to bid for or construct PCS systems for an entire BTA can thus acquire licenses in areas they wish to serve or form bidding consortia and partition the entire BTA among themselves. We believe that rural partitioning is an efficient method of getting a license in the hands of an entity that will provide rapid service to rural areas.

153. We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS in their rural telephone service areas, consistent with our statutory mandate. In addition, our eligibility criteria for bidding in the entrepreneurs' blocks, discussed below, will permit virtually all telephone companies whose service areas are predominantly rural to bid on licenses in frequency blocks C and F without competition from the large telephone companies and other deep-pocketed bidders. Thus, virtually all rural telephone companies will be able to bid for broadband PCS licenses and defer payment in accordance with the installment payment plans we are adopting for the entrepreneurs' blocks. We also note that if a rural telephone company meets the definition of a small business or a business owned by minorities and/or women, it would enjoy a bidding credit and "enhanced" installment payments applicable to those groups when bidding on licenses in these blocks. We do not think that any other measures are necessary in order to satisfy the statute's directive that we ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services, and to satisfy our goals to ensure that PCS is provided to all areas of the country including rural areas.

I. Upfront Payments

154. Upfront payment requirements are designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.¹³⁰ The upfront payment ensures that bids during the course of the auction are bona fide and convey information about the value of the underlying licenses. Our standard upfront payment for broadband PCS is \$0.02 per MHz per pop, which is equivalent to roughly six percent of the license value, based on an estimate in a Congressional Budget Office report of the total value of the auctionable

¹³⁰ Second Report and Order, ¶¶ 169-80.

spectrum.¹³¹ A number of commenters assert that the Commission could enhance the opportunity of designated entities to participate in competitive bidding by reducing the required upfront payment for those applicants.¹³² We agree that the \$0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the entrepreneurs' blocks will be entitled to pay for their licenses in installments, which requires a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

155. For these reasons, we will reduce the upfront payment requirement to \$0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and permit them to conserve resources for infrastructure development after winning a license. Moreover, since the upfront payment is still substantial, ranging from slightly below \$20,000 for a 30 MHz license in the smallest BTAs to more than \$10 million for the New York BTA, insincere bidding will be discouraged and the Commission will have access to funds if it must collect default or bid withdrawal penalty payments.

J. Definitions and Eligibility

1. Eligibility to Bid in the Entrepreneurs' Blocks

156. As noted previously, eligibility to bid in the two entrepreneurs' blocks, C and F, is limited to companies that, together with their affiliates and investors, had gross revenues of less than \$125 million in each of the last two years and have total assets of less than \$500 million at the time their short form applications are filed. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor or principal in the applicant has \$100 million or greater in personal net worth at the short form application filing date.

157. In determining whether an applicant satisfies these financial thresholds, we will count the gross revenues and total assets of the applicant as well as those of its investors with "attributable" interests. The subsection that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants and for publicly-traded companies.

a. Attribution Rules for the Entrepreneurs' Blocks

¹³¹ Id. at ¶ 177.

¹³² See e.g., comments of AWCC at 31-32, Minnesota Equal Access at 2, NAMTEC at 20, Rural Cellular Corp. at 2, U.S. Intelco at 22-23.

158. Qualified "Entrepreneurs". As a general rule, the gross revenues and total assets of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for purposes of determining whether the \$125 million/\$500 million thresholds have been exceeded, and on an individual basis regarding the \$100 personal net worth standard.¹³³ There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on an aggregate basis, exceed the gross revenue/total asset caps. Second, the gross revenues, total assets, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds less than 25 percent of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or de minimis amounts of voting stock that include no more than five percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be less than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.¹³⁴ The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.¹³⁵ In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues, total assets and personal net worth (if applicable) of each member of the control group and each member's affiliates will be counted toward the \$125 million gross revenues/\$500 million total assets thresholds or the individual \$100 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

159. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity

¹³³ By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

¹³⁴ Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

¹³⁵ So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps. At the same time, it will afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders.¹³⁶ Similarly, the five percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue control over eligible firms.¹³⁷ For all of these reasons, we also will attribute the gross revenues and total assets of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.¹³⁸

160. Qualified Woman and Minority-Owned "Entrepreneurs". As discussed above, the record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues, assets, or net worth of any single investor in a minority or woman-owned applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as five percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.¹³⁹ As discussed above with regard to general eligibility to bid in the entrepreneurs' blocks, winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the \$125 million gross revenue/\$500 million total asset thresholds or the individual \$100 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

¹³⁶ Several commenters have suggested that we establish an attribution threshold for investors in a broadband PCS applicant. See, e.g., ex parte filings of Columbia PCS, June 2, 1994 (20 percent threshold), and Impulse Telecommunications Corporation, May 27, 1994 (10 percent threshold).

¹³⁷ In the event that the five percent voting stock limitation proves to be overly restrictive, we may consider whether a higher threshold (e.g., 15 percent) would be sufficient to meet our concerns about undue control from large investors.

¹³⁸ The definition of an "affiliate" is set forth in subsection 5, infra.

¹³⁹ As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

161. Relaxing the attribution standard somewhat in determining eligibility of women and minority-owned companies to bid for licenses on frequency blocks C and F directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid in these blocks (i.e., who otherwise meet the \$125 million gross revenues/\$500 million total asset standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume de facto control of the applicant. Because this step gives large companies, who are otherwise ineligible to bid in the entrepreneurs' blocks, a significant incentive to "partner" with minority and women-owned firms, it will enhance the likelihood that these designated entities will be both successful in the auctions and become viable, long-term competitors in the PCS industry.

162. Of course, women and minority-owned firms, like any other applicant for a C or F block license, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements to bid in the entrepreneurs' blocks. Specifically, the gross revenues, total assets and net worth of all investors holding 25 percent or more of the company's passive equity (as defined to include 5 percent or more of the voting stock) will be attributed toward the \$125 million/\$500 million caps or the \$100 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

163. Qualified Publicly-Traded "Entrepreneurs". We also believe that these attribution rules may impose a particular hardship on publicly traded companies, which have little control over the ownership of their stock, and whose voting stock typically is widely held. Therefore, for purposes of determining eligibility to bid in the entrepreneurs' blocks, we adopt an exception from these rules for publicly traded companies.¹⁴⁰ Specifically, we will not attribute the gross revenues or total assets of a shareholder in a publicly traded company that owns up to 25 percent of the corporation's equity, even if that equity is represented by up to 15 percent of the voting stock. To take advantage of this exception, however, the eligible control group of the applicant still must control the corporation, hold at least 50.1 percent of the voting stock, and at least 25 percent of the company's equity.¹⁴¹

¹⁴⁰ "Publicly-traded company" shall mean a business entity organized under the laws of the United States whose shares, debt or other ownership interests are traded on an organized securities exchange within the United States.

¹⁴¹ We note that this exception for publicly held companies is only applicable for purposes of assessing eligibility to bid in the entrepreneurs' blocks and for the general installment payment option. In the event that a publicly traded company can demonstrate that the 15 percent threshold would impose a serious hardship, the Commission would entertain a

164. De Facto Control Issues. We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains de facto as well as de jure control of the firms that are eligible for special treatment under the rules for broadband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.¹⁴² These SBA rules, which are codified in 13 CFR 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure de facto control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the Second Report and Order, designated entities must be prepared to demonstrate that they are in control of the enterprise.¹⁴³

165. Financial Benefits. To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements, also borrowed from SBA rules. As noted previously, we shall require that at least 50.1 percent of each class of voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be

request to raise the threshold in individual cases. Companies seeking such relief must also demonstrate that raising the threshold would not contravene the Commission's control objectives, as described in this Order. We do not believe, however, that publicly traded corporations with individual shareholders owning up to 15 percent active equity require additional special provisions such as bidding credits, "enhanced" installment payments, or tax certificates to overcome capital access problems. Thus, we will not apply this exception with regard to the small business definition or the definition of a woman or minority-owned business.

¹⁴² As discussed below, these SBA affiliation rules also will be used as a basis for our own rules defining "affiliates" for purposes of determining whether particular entities meet the financial thresholds for bidding in the entrepreneurs' blocks or for qualifying as a small business.

¹⁴³ Second Report and Order at ¶ 278, citing Intermountain Microwave, 24 Rad. Reg. 983, 984 (1963).

entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

166. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise pro rata in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

167. Application of the Five-Year Holding Rule. Finally, we explain how these attribution rules apply with regard to the five-year holding and limited transfer period for C and F block licensees. During this five-year period, a C or F block licensee must not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that investor's gross revenues or total assets would bring the company over the \$125 million gross revenues/\$500 million total assets thresholds, or if that investor's personal net worth exceeds the \$100 million personal net worth cap. Similarly, while individual members of the control group may change (if it would not result in a transfer of control of the company), the control group must maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.¹⁴⁴ A company will be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.¹⁴⁵

168. Abuses. As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses in the entrepreneurs' blocks are bona fide in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees in the entrepreneurs' blocks or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue

¹⁴⁴ A minority or woman-owned company must continue to adhere to the attribution rules applicable to it, set out above.

¹⁴⁵ These rules will continue to apply in this manner throughout the license term with regard to a firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

b. Limit on Licenses Awarded in Entrepreneurs' Blocks

169. The special provisions which we adopt for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. §309(j)(3)(B). Therefore, in adopting the financial assistance measures set forth in this Report and Order, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We shall therefore take steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

170. To achieve a fair distribution of the benefits intended by Congress, we shall impose a reasonable limit on the total number of licenses within the entrepreneurs' blocks that a single entity may win at auction. In setting this limit, we shall take care not to impose a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient regional services. Specifically, we shall impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. These licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. Such a limit will ensure that at least ten winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it will allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

171. Further, this limitation will apply only to the total number of licenses that may be won at auctions in these blocks; it is not an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we shall consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

2. Definition of Small Business

172. In the Second Report and Order we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of \$6 million with average net income after Federal income taxes for the two

preceding years not in excess of \$2 million. 13 C.F.R. § 121.601.¹⁴⁶ In the Second Report and Order, we noted, however, that, in certain telecommunications industry sectors, this limit may not be high enough to encompass those entities that, while needing the assistance provided by installment payments, have the financial wherewithal to construct and operate the systems. Therefore we indicated that, on a service specific basis, we might adjust this definition upward to accommodate capital intensive telecommunications businesses. See Second Report and Order at ¶ 267.

173. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive broadband PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than \$40 million in gross revenues. Similarly, Suite 12 suggests a \$75 million in annual sales threshold.¹⁴⁷ As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.¹⁴⁸

¹⁴⁶ The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. See 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to \$18 million net worth and \$6 million after-tax net income. 15 C.F.R. § 121.802(a)(3)(i). The change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955. However, Section 121.601, which was the SBA size standard cited in the Notice and the Second Report and Order, has not been modified by the SBA. For purposes of our generic competitive bidding rules, in consultation with the SBA, we will reexamine our \$6 million net worth/\$2 million annual profits definition in light of the SBA's recent action.

¹⁴⁷ Many other commenters set forth their recommendations on the appropriate small business definition for broadband PCS preferences. See, e.g., comments of Tri-State (\$5 million average annual operating cash flow), Luxcel (net worth not exceeding \$20 million), and Iowa Network (less than \$40 million in annual revenues).

¹⁴⁸ Some parties recommend using the SBA's alternative 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria.

174. We expect broadband PCS to be a highly capital intensive business requiring bidders to expend tens of millions of dollars to acquire a license and construct a system even in the smaller broadband PCS markets. Thus, we believe that our current small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of broadband PCS services. Accordingly, we modify our small business definition for broadband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of broadband PCS services.

175. There is substantial support in the record for a \$40 million gross revenue standard. For example, the SBA recommends that for broadband PCS, a small business be defined as one whose average annual gross revenues for its past three years do not exceed \$40 million.¹⁴⁹ It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with \$40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.¹⁵⁰ Similarly, the SBA Chief Counsel for Advocacy asserts that a \$40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."¹⁵¹ For purposes of broadband PCS, we shall therefore define a small business as any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of \$40 million.¹⁵² In

Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. See, e.g., comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

¹⁴⁹ Ex parte filing of U.S. Small Business Administration, June 24, 1994.

¹⁵⁰ Id.

¹⁵¹ Comments of SBA Office of Advocacy at 10. Cf. comments of Iowa Network and Telephone Electronics Corporation (advocating a \$40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating \$40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

¹⁵² The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642 (a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average gross revenues of such business over a period of not less than three years. See Pub. L. No. 102-366, Title II, § 222 (a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a) (2) (B) (ii).

addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has \$40 million or more in personal net worth.¹⁵³

176. For purposes of determining whether an entity qualifies as a small business, we will follow the control group and attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks. In particular, winning bidders are required to identify on their long-form applications a control group that holds at least 50.1 percent of the voting interests of the applicant (and otherwise has de facto control) and owns at least a 25 percent equity stake. The gross revenues of each member of the control group and each member's affiliates will be counted toward the \$40 million gross revenue threshold, regardless of the size of the member's total interest in the applicant. The \$40 million personal net worth limitation will also apply to each member of the control group. We will not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as five percent of the voting stock in a corporate applicant.

177. We also adopt the more relaxed attribution standard set forth in the entrepreneurs' blocks section with regard to investors in minority and female-owned applicants. Specifically, we will not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as five percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock.¹⁵⁴ We believe that such revenue attribution will ensure that only bona fide small businesses are able to take advantage of the special provisions we have adopted, but will allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

178. These financial eligibility rules will continue to apply throughout the license term. Thus, firms that received bidding credits and "enhanced" installment payments based on their small business status will be subject to the repayment penalties outlined above, if an investor subsequently purchases an "attributable" interest (e.g. 25 percent or more of the firm's equity) and, as a result, the gross revenues of the firm exceed the \$40 million gross

¹⁵³ Unlike our eligibility criteria to bid in the entrepreneurs' blocks, we do not adopt a total assets standard here. We believe that the \$40 million gross revenue cap for small businesses, together with the \$500 million total asset threshold we set for entry into the entrepreneurs' blocks in the first instance, should be sufficient to ensure that only bona fide small businesses are able to take advantage of the measures intended for those designated entities.

¹⁵⁴ See supra ¶ 160.

revenues cap, or the personal net worth of the investor exceeds the \$40 million personal net worth threshold.

179. Finally, we will allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

180. Several commenters argue that a consortium should not qualify for special treatment unless the consortium itself meets the established definitional criteria.¹⁵⁵ They contend that the FCC should not allow consortia to be used as a means of circumventing the usual prerequisites for these special provisions. In the Second Report and Order, we concluded that consortia might be permitted to receive benefits based on participation in the consortium by one or more designated entities, but believed such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the broadband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors. Because of the exceptionally large capital requirements in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as distinguished from a single entity with gross revenues in excess of \$40 million, still are likely to encounter capital access problems and, thus, should qualify for measures aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses, as recommended by several commenters.¹⁵⁶ This would have the effect of eviscerating our small business definitional criteria and would not further the ability of bona fide small businesses to participate in PCS services.

3. Definition of Women and Minority-Owned Business

181. As discussed above, we have taken steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the broadband

¹⁵⁵ See comments of McCaw at 21 and Myers at 6.

¹⁵⁶ See, e.g., comments of Rural Cellular Corp. at 2, Bell Atlantic at 17, NAMTEC at 19, and AT& T at 25-26.

PCS service.¹⁵⁷ We thus have adopted a tax certificate program for women and minorities to allow more sources of potential funding, have relaxed the attribution standard used to determine eligibility to bid for licenses on frequency blocks C and F, and have adopted special measures for installment payments and bidding credits.

182. As also indicated above, for purposes of implementing these steps, we have departed from the definition of a minority and woman-owned firm that was adopted in the Second Report and Order. There, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least a 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. Second Report and Order at ¶ 277; 47 C.F.R. § 1.2110(b)(2). For the broadband PCS auctions, we retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we shall impose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as five percent of the voting stock. In addition, provided that certain restrictions are met, we shall also allow women and minority-owned firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

183. We emphasized in the Second Report and Order that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a fully-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, that different standards that meet the same objectives may be appropriate in other contexts. Second Report and Order at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptionally great financial resources believed to be required by broadband PCS applicants, we conclude that it is appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

¹⁵⁷ As noted in the Second Report and Order, the members of the following groups will be considered "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses will be eligible for special measures only if the minority and women principals are also United States citizens.